MARY NG v. REG.

[J. C. (Lord Reid, Lord Tucker and the Rt. Hon. Mr. L. M. D. de Silva) March 19, 1958]

[Privy Council Appeal No. 20 of 1957]

Criminal Law and Procedure — Facts especially within knowledge of accused — Onus of proof — No burden on accused to prove that no crime has been committed — Burden upon prosecution to prove affirmatively commission of offence — Evidence Ordinance (Cap. 4), ss. 107 and 115.

Evidence — Deceit — Burden of proof.

The appellant Mary Ng was charged with and convicted of attempting to cheat one Hou Suai Lian and thereby attempting dishonestly to obtain $2,500 from him representing to him that she was able to induce the Magistrate before whom Hou Suai Lian was to be charged with a criminal offence, viz. with being in possession of prepared opium and smoking utensils, to show favour to him. The First Criminal District Judge held that whether or not the appellant could induce the Magistrate to show favour to Hou Suai Lian was a fact which was especially within the knowledge of the appellant, and that under section 107 of the Evidence Ordinance the onus was on the appellant to show that she could not induce the Magistrate to show favour to Hou Suai Lian.

The appellant was convicted and sentenced to three months' imprisonment and a fine of $5,000. She appealed to the High Court and her appeal was dismissed but the fine was reduced to $3,000.

By special leave the appellant appealed to the Judicial Committee of the Privy Council.

Held: by reason of section 107 of the Evidence Ordinance no burden was placed on the appellant in the present case to prove that there had been no deceit. The burden was on the prosecution to prove affirmatively that there had been. It should have been made to appear sufficiently on established facts that the appellant had no reason to believe that she could have influenced the Magistrate, and that had not been done. There was in fact no evidence against the appellant on a principal ingredient of the charge, namely, deceit, and the case, therefore came within the range of cases in which the Board would interfere.

Attygalle v. R.[1] applied.

Decision of the High Court (Knight J., June 17, 1957) reversed and conviction quashed.

Case referred to:—

(1) *Attygalle v. R.* (1936) A.C. 338; (1936) 2 All E.R. 116; 52 T.L.R. 390.

PRIVY COUNCIL APPEAL

Bernard Gillis, Q.C. and *John Lloyd-Eley* for the appellant.

J. G. Le Quesne for the Crown.

The judgment of their Lordships was delivered by:—

Mr. L. M. D. de Silva: — This is an appeal from a judgment of the 17th June, 1957 of the High Court of Singapore dismissing an appeal from a judgment of the First Criminal District Court of Singapore whereby the appellant had been convicted of an attempt to cheat.

There were two charges in the alternative against the appellant framed thus:—

"CHARGE"

"You Mary Ng are charged that you between 26th February and 28th February 1956 at Singapore, attempted to obtain from one Hou Suai Lian for yourself a gratification of two thousand five hundred dollars as a reward for inducing, by the exercise of personal influence, a Public Servant, to wit, Mr. J. M. Devereux-Colebourn, 4th Magistrate, Singapore, in the exercise of his official functions as 4th Magistrate, to show favour to the said Hou Suai Lian in connection with 4th Magistrate Court Case No. 1571/55, and thereby committed an offence punishable under Section 163 of the Penal Code (Cap. 119).

Alternatively.

You Mary Ng are charged that you, between 26th February and 28th February 1956 at Singapore, did attempt to cheat one Hou Suai Lian by representing to him that you were able to induce Mr. J. M. Devereux-Colebourn, 4th Magistrate, Singapore to show favour to him in connection with 4th Magistrate Court Case No. 1571/55, and thereby dishonestly attempted to induce the said Hou Suai Lian to deliver to you the sum of two thousand five hundred dollars, and you thereby committed an offence punishable under Sections 420 and 511 of the Penal Code (Cap. 119)."

The appellant was convicted on the second charge. She was acquitted by the Trial Judge on the first charge for reasons which their Lordships do not propose to discuss as no question as to the correctness of those reasons falls for decision on this appeal. But, whatever the reasons for the acquittal, it will be seen from what follows that the charge which arose directly from the facts spoken to by the witnesses was the first one. It may be regarded as the main charge. The grave offence alleged in it was that of attempting to obtain from an accused person a gratification as a reward for influencing a Magistrate. The second charge makes the subsidiary allegation that the appellant attempted to cheat by making the representation that she could influence the Magistrate. For the second charge to succeed it must be established both that she made the representation and that at the time of making it she did not believe it to be true.

In brief outline the prosecution evidence was to the following effect: — On the 26th July, 1955, one Hou Suai Lian was charged in the Fourth Magistrate's Court with being in possession of prepared opium and smoking utensils. After some postponements the case was fixed for hearing on the 29th February, 1956. On the 25th February, 1956 Hou Suai Lian accompanied by a friend Liang San Han met one Kok Min Yin by appointment. Kok Min Yin informed Hou Suai Lian that he had been sent by the appellant to speak to him about the opium charge and that the appellant could help him. By arrangement Kok Min Yin took Hou Suai Lian and Liang San Han on the 26th February, to the appellant's flat. She introduced herself as the wife of the Fourth Magistrate and showed them a photograph of herself with the Magistrate's arm around her. She said she could get an acquittal for Hou Suai Lian for a sum of 3,500 dollars. Hou Suai Lian said he could not

pay. There were some negotiations for a reduction of the amount but no payment was made. The appellant warned him that if at least 2,500 dollars were not paid he would be fined 3,000 dollars by the Court and would be sent to jail for six months. The next day Hou Suai Lian was tried in the Fourth Magistrate's Court, convicted and sentenced to three months imprisonment and a fine, in default a further three months imprisonment.

On a search of the appellant's flat the police found, amongst other things, a visitor's permit to the General Hospital to visit the Magistrate in question, a card relating to a change of address by him, and an invitation to a party given by him.

The Trial Court and the High Court held that the evidence established the facts mentioned and their view of the evidence is not challenged on this appeal.

The evidence led by the prosecution, if accepted, would have sustained a conviction on the first charge. With regard to the second charge it is not disputed that falsity of the representation made by the appellant that she could induce the Magistrate to show favour was, under the relevant sections of the Penal Code of Singapore, a necessary ingredient of the charge. It will be seen that the evidence set out above failed to establish this ingredient. The Magistrate himself whose evidence was relevant upon this point was not called. He was in attendance up to a certain stage of the proceedings. Defence counsel pointed out that he was about to leave the Colony whereupon the prosecuting officer said he did not desire to call him.

It was argued before the Trial Judge that the prosecution had failed to prove that the representation made by the appellant that she could influence the Magistrate was false. He was of opinion that falsity and deceit had been established by reason of a statutory provision in the Singapore Evidence Ordinance. He said :—

> "In my view I don't think it was necessary for the prosecution to call Mr. Devereux-Colebourn as a witness to say that he could not be influenced by the accused before the Court could be satisfied that there was deceit. Whether the accused could or could not induce Mr. Devereux-Colebourn to show favour to Hou Suai Lian was a fact which was especially within the knowledge of the accused and I was of the opinion that under Section 107 of the Evidence Ordinance (Cap. 4) it was not necessary for the prosecution to prove deceit by calling Mr. Devereux-Colebourn to say that the accused could not influence him. The onus was on the accused to prove that she could induce Mr. Devereux-Colebourn, to show favour to Hou Suai Lian."

This view is erroneous. Section 107 of the Singapore Evidence Ordinance is to the following effect :—

> "Section 107. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

This section is identical with section 106 of the Indian Evidence Act and with section 106 of the Ceylon Evidence Ordinance. The latter was considered by the Board in the case of *Attygalle v. The King*[1] at p. 341 in which two accused were prosecuted, the first for performing an illegal operation the second for aiding and abetting him. The Trial Judge directed the jury thus :—

> ". . . ; that section says when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Miss Maye" — that is the person upon whom the operation was alleged to have been performed — "was unconscious and what took place in that room that three-quarters of an hour that she was under chloroform is a fact especially within the knowledge of these two accused who were there. The burden of proving that fact, the law says is upon them, namely, that no criminal operation took place, but that what took place was this speculum examination."

Viscount Hailsham delivering the judgment of the Board said of this passage :—

> "Their Lordships are of opinion that that direction does not correctly state the law. It is not the law of Ceylon that the burden is cast upon an accused person of proving that no crime has been committed. The jury might well have thought from the passage just quoted that that was in fact a burden which the accused person had to discharge."

It is clear therefore that by reason of the section no burden was placed upon the appellant in the present case to prove that there had been no deceit. The burden was upon the prosecution to prove affirmatively that there had been.

The learned Judge of the High Court who affirmed the conviction does not uphold the view of the Trial Court on the effect of section 107. He makes no reference to that section. He bases himself on section 115 of the Evidence Ordinance which was not referred to by the Trial Judge. This section is to the following effect :—

> "The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.
>
> **Illustrations**
>
> The Court may presume —
>
> (a) .....
> (b) .....
> (c) .....
> (d) .....
> (e) that judicial and official acts have been regularly performed.
> (f) .....
> (g) .....
> (h) .....

The section says that "The Court may presume the existence of any fact which it thinks likely to have happened" regard being had to certain things "in their relation to the facts of the particular case". In this particular case what is the fact which the Court could think is "likely to have happened"? It may be argued that the presumption arises that, when the Magistrate convicted Hou Suai Lian, he was not influenced by the appellant. Assuming without decid-

ing that this argument is correct, it does not help the prosecution because, according to the prosecution, she had not taken any money to influence the Magistrate or undertaken for any other reason to influence him, and therefore the fact that he was not influenced is of no significance. As there is no other fact in aid of the prosecution which could be suggested was "likely to have happened", resort to section 115 fails to establish deceit. Further, even if it had been established not merely that the Magistrate was not influenced but that he could not have been influenced, the inference of deceit does not necessarily arise. There is still left open the possibility that the appellant might have quite genuinely, though incorrectly, thought that she could have influenced the Magistrate. In that case she would have been guilty of an error of judgment not of deceit. Something more was necessary to establish deceit. It should have been made to appear sufficiently on established facts that the appellant had no reason to believe that she could have influenced the Magistrate. This has not been done. The evidence of the Magistrate would have been material on this point and it is remarkable that he was not called. The High Court observed :—

> "Mr. Devereux-Colebourn, the Magistrate involved, was present at the trial but for some reason was not called by the prosecution. I might add that this was a very serious case involving as it did, *inter alia*, the integrity of the Magisterial Bench and I am astonished that the prosecution was not conducted by an experienced Crown Counsel from the Attorney-General's chambers rather than a Police officer . . . . . ."

With these remarks their Lordships agree. There were matters in this case which needed a full investigation and, even if it had been possible for the prosecution to rely on statutory presumptions to secure a conviction, the investigation should have taken place. Their Lordships are of opinion that section 115 cannot be relied on to establish deceit. It is not necessary for them in this case to examine the broader ground whether section 115, any more than section 107, can dispense with the necessity for proof by the prosecution of one of the principal ingredients alleged in the charge.

The appellant in the course of the proceedings on the 8th and 9th October 1956 put in two written statements which she was entitled to do under section 172 sub-section (1) of Criminal Procedure Code of Singapore (Cap. 132 Vol. III Laws of The Colony of Singapore p. 408). In one of them she gave a version entirely different to that given by the prosecution of what had happened and completely exculpated herself. She said that Hou Suai Lian, Kok Min Yin and Liang did come to see her and asked her for her intervention with the Magistrate to obtain an acquittal of Hou Suai Lian. She said "I replied that I was in no position to do so and that it was very wrong of them to have come to see me on a matter of this nature". The High Court appears to regard these words as having a bearing on the question of proof of deceit. The Trial Judge made no reference to them. It is clear that if the exculpatory statement, as a whole, of the appellant were to be accepted she would have to be acquitted. The conviction therefore involved a rejection of the statement as a whole. Does the part of the statement quoted, properly regarded, possess any probative value? Their Lordships do not find it necessary to discuss here the effect of an unsworn statement put in under sub-section 172(1). It is sufficient to say that what was said in the sentence quoted is in direct conflict with the sworn testimony of witnesses who were regarded by both Courts as truthful. The Trial Judge says "I had no doubt that Hou Suai Lian and Liang San Han were truthful witnesses". Liang San Han said :—

> "The accused did not say she had no influence with the Fourth Magistrate. The accused did not say that we had no right to go there and ask her to do such a thing."

Hou Suai Lian :—

> "The accused did not say she could not influence the Fourth Magistrate. Not true the accused refused to help me."

The Lordships are of opinion that the words quoted must be regarded as having no probative value and could not be utilised either for or against the appellant.

It is not necessary to refer to the second statement the appellant put in under sub-section 172(1). The High Court regarded it as of no probative value and their Lordships are of the same opinion.

It has been repeatedly stated that the Judicial Committee is not a Court of Criminal Appeal and it is now necessary to examine whether this is a case in which their Lordships should interfere. Every error of law would not justify an interference. It is clear that but for erroneous views of the Courts below on the statutory presumptions earlier discussed the case against the appellant would, without doubt, have failed. There was in fact no evidence against her on a principal ingredient of the charge namely deceit. The case therefore comes within the range of cases in which their Lordships will interfere.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal be allowed, the order of conviction set aside and the appellant acquitted.

Appeal allowed

Solicitors: *Kingsley Wood & Co.; Charles Russell & Co.*